McKey v. *Lee* misconstrue the intention of the act in admitting the application of Section 60*c* to guilty preferred creditors, but that the latter case correctly applies it to an innocent preferred creditor.

FIRE INSURANCE.—WAIVER OF INCUMBRANCE PROVISION.—The New York Court of Appeals, by a division of four to three, on February 5, 1901, rendered a decision of great interest and importance to the insurance world. *Skinner* v. *Norman, Jr.*, New York Law Journal, February 25, 1901. The plaintiff sent his agent to procure insurance on a steamboat. The agent of the insurance company asked if the boat was encumbered and was told he could learn by inquiry of the owner. This inquiry he agreed to make. The policy contained a provision making it void, unless all encumbrance should be noted therein. The boat was mortgaged, but no mention of the mortgage was made in the policy. *Held*, that the company had waived the warranty against incumbrance.

It is perhaps significant that the Court puts its decision upon two grounds, which do not strengthen each other, but involve totally different principles. One is notice to the company of the encumbrance, the other is the authority of the agent to undertake to search the title of the insured. It is settled law in New York, and most jurisdictions generally, that actual knowledge of the agent of ground for forfeiture is constructive notice to the company, and that the company waives the warranty against encumbrance by issuing a policy if, at the time the application was made, the agent knew the policy could be avoided.

Van Schaick v. *Niagara Falls Ins. Co.* 68 N. Y. 434 (1877); *Gray* v. *Germania Fire Ins. Co.* 155 N. Y. 180 (1898); *Continental Ins. Co.* v. *Chamberlain*, 132 U. S. 304 (1889); *Mahoney* v. *Natl. & Life Ass'n*, L. R., 6 C. P. 252 (1871); *Germania Fire Ins. Co.* v. *McKee*, 94 Ill. 494 (1880). If, then, the agent of the company had actually known of the mortgage on the boat, the plaintiff's right to recover on the policy would be clear. But such is not the fact. The agent did not know, he merely said he would find out. Nevertheless the Court extended the doctrine of constructive notice to the company to this case, relying upon the analogy between the waiver of an unknown breach of warranty and a general release. This seems to lose sight of the real difficulty. Had the insured dealt directly with the company, instead of an agent, the analogy would be more complete. Furthermore, a general release raises no question of admitting parol evidence to vary the written instrument. The two essentials to constitute a waiver of a condition broken at the time the policy is issued have been supposed to be actual knowledge of the agent and delivering the policy by the company. Hereafter in New York actual knowledge of the agent is unnecessary if he might have known, or has volunteered to find out. Constructive notice to the agent of material facts is made constructive notice to the insurance company. Since the rule as formerly applied was anomalous, the sound-

ness of extending it further seems open to doubt. *Batchelder* v. *Queens Ins. Co.* 135 Mass. 449 (1883); *Dewees* v. *Manhattan Ins. Co.* 6 Vroom (N. J.), 366 (1872).

The second ground upon which the decision is based is that the agent of the company had authority to search title. The Court neither cites authority for this proposition, nor supports it by argument. It is simply assumed. Here, again, the act of agent should have been sharply distinguished from the same act of the company. The company could have undertaken to search the title of the insured, but it does not follow that the soliciting agent had authority to undertake the search in behalf of the company. If the agent was not authorized to investigate the condition of the title of insured, his volunteering to do it in no wise affects the company. No ratification is claimed. No case has been found in which this question has been passed upon.

The authority of the agent has been much discussed where he delivers the policy without collecting the first premium. It has been held that he can determine how and when this premium shall be paid when he closed the contract. *Bodine* v. *Exchange Fire Ins. Co.* 51 N. Y., 117 (1872). But this does not warrant the conclusion that a soliciting agent has, from the nature of his duties, implied authority to search the title of applicant for insurance. The absence of decisions on this point indicates that it is not customary for agents to undertake a task so far removed from the line of their ordinary duties.